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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SY SAECHAO,

Defendant and Appellant.

A133919

(San Francisco County  
Super. Ct. No. 211725)

In 2003, pursuant to a negotiated plea agreement, defendant Sy Saechao pleaded guilty to violating Health and Safety Code, § 11352 (transport/sale of controlled substance), based on a specific allegation that he sold or offered to sell cocaine base (*id.*, § 11352, subd. (a); see Pen. Code, § 1203.073, subd. (b)(7)<sup>1</sup>). The trial court deferred entry of judgment and ordered defendant to attend the San Francisco drug court program. Defendant acknowledged that his failure to complete the drug court diversion program would result in entry of judgment and imposition of a three-year probationary term.<sup>2</sup> Defendant failed to complete the required drug court program. In 2011, the trial court terminated defendant from the drug court program and reinstated the criminal proceedings. After denying defendant's motion to

<sup>1</sup> All further unspecified statutory references are to the Penal Code.

<sup>2</sup> Although section 1203.073, subdivision (b)(7), generally prohibits probation when a person sells or offers to sell cocaine base, the Legislature has granted the trial court discretion to order probation "in an unusual case where the interests of justice would best be served," even if the defendant would not otherwise qualify for probation under section 1203.073, subdivision (b). (§ 1203.073, subd. (a).)

withdraw his guilty plea, the court entered the deferred judgment and placed defendant on formal probation for three years. Defendant filed a timely notice of appeal and the trial court issued a certificate of probable cause. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>**

On May 13, 2002, defendant was arrested after a “buy/bust” operation. After an undercover police officer asked defendant for \$20 worth of suspected crack cocaine, defendant entered a residence, returned, and placed a small piece of suspected crack cocaine in the officer’s hand in exchange for marked city funds. After defendant was arrested, the police searched his residence and found a bag of suspected crack cocaine at the bottom of the back stairs. On May 15, 2002, a complaint was filed charging defendant with violating Health and Safety Code sections 11352, subdivision (a) (Transport/Sale Controlled Substance), based on a specific allegation that he sold or offered to sell cocaine base.

On January 22, 2003, the case appeared on the court calendar for a preliminary hearing. At that time, pursuant to a negotiated plea agreement, defendant pleaded guilty to violating Health and Safety Code section 11352, subdivision (a). The trial court referred defendant to the San Francisco drug court program, pursuant to the deferred entry of judgment (DEJ) statutes. (Pen. Code, § 1000 et seq.) Defendant agreed that his failure to complete the drug court diversion program would result in entry of judgment and the imposition of a probationary term of three years.

Defendant attended but did not complete the required drug court program in 2003 and 2004. When he failed to appear for a required trial court hearing in March 2004, a bench warrant was issued for his arrest. Defendant remained a fugitive until January 27, 2011, when he was involuntarily returned to the trial court after his arrest on the outstanding warrant. At that time, the trial court asked the drug court to reassess defendant’s suitability

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<sup>3</sup> The facts are taken from the probation report and other undisputed documents in the record.

for its program. Drug court assessors submitted reports for trial court proceedings scheduled for February 3, 10, 23, and March 10, 2011. During the assessment period, defendant was asked to comply with certain treatment protocols of periodic drug testing and attending 12-step meetings. In their initial reports, the drug court assessors noted that defendant was “testing negative for all illicit substances,” and preliminarily it appeared that defendant did not have a substance abuse problem. However, in the completed assessment report, the drug court assessor commented that defendant stated his drug of choice was cocaine. “Before he entered Drug [C]ourt he was using 3-4 X per month about a gram and on the weekends only. He was at this level for 1 year. . . . He last smoked cocaine 2X previous to entering DC.” Defendant also stated that on his own he had been able to abstain from drugs in 2005 while he cared for his son who had been injured in a car accident. When first questioned about his drug use, defendant minimized his use so that “he would be given less programming.” “[A]s he became more comfortable in the group he began to understand that he needed to address his addiction in order to improve his life.” In their final report, the drug court assessors set forth defendant’s contradictory statements regarding his drug use: when first questioned on intake, defendant said he used to use crack cocaine daily but he had not used the drug for over 8 years. When he was finally assessed, defendant informed the evaluator that he has smoked up to 1 gram of cocaine 1 to 2 times a month. However, when defendant was further questioned, he said he did not use any illicit drugs and he did not have a drug problem. Defendant also stated that if he was found not suitable for drug court “he would go out and use,” and he was in drug court because he “needed this 10-year-old case off his record.” The drug court found defendant was “not suitable” for its program and recommended that defendant be “terminated from Drug Court.” At the March 10, 2011 trial court proceeding, defendant’s counsel informed the court that the drug court had found defendant was “not suitable” for its program. The trial court terminated defendant from the drug court program, reinstated the criminal proceedings, and scheduled the matter for sentencing.

Before sentencing, on June 15, 2011, defendant moved to withdraw his guilty plea on the ground that he was dismissed from the drug court program for reasons out of his control. In a memorandum of points and authorities, defense counsel explained defendant's aborted attempts to complete the required drug court program. In January 2003, defendant attended the San Francisco drug court for two months but he lost his home and he was forced to move to Sacramento. In Sacramento, defendant again attended a court-approved drug program for two months but he was subsequently terminated because he was unable to pay the associated costs. He also claimed he had no means to get to San Francisco for his next court appearance. Because he missed his court appearance a bench warrant was issued for his arrest in December of 2004. Although he was unable to attend drug court after being terminated, defendant contended he was able to stop using drugs on his own and he had no further police encounters involving drugs. In 2011 while driving, defendant was stopped by a police officer and arrested on the outstanding warrant. He was sent to San Francisco and was eventually ordered back into the original drug court program. He attended daily and passed all drug screenings during the next three months, and he was three months from finishing the program when he was abruptly terminated without cause.

The People opposed defendant's motion, arguing that defendant had agreed to, but failed to complete a drug court program, and his failure did not entitle him to withdraw his plea. The trial prosecutor presented an alternative rendition of the circumstances of defendant's aborted attempts to complete the required drug court program as follows. "In May 2003, a progress report stated that Defendant was not compliant with his treatment plan. Defendant was referred to the MAAP Substance Abuse Program in Sacramento, but dropped out of the program in 2004. Defendant returned to San Francisco in 2011, and attempted to reenroll in drug court. [¶] When Defendant first re-entered drug court, he indicated he had not used crack cocaine for over eight years. Defendant then told the assessor that if he were found unsuitable for drug court, he would start using drugs again. During an assessment, Defendant stated he smoked up to 1 gram of Cocaine one or two times a month. During a

subsequent meeting, Defendant admitted that he does not have a drug problem, but needed to complete the program in order to get this ten-year-old case off his record. Consequently, Defendant was found to be unsuitable for the program.”

At a July 19, 2011 proceeding, the trial court heard argument on defendant’s motion to withdraw his guilty plea. Defense counsel again explained the reasons for defendant’s failures to complete the drug court program in 2003 and 2004. According to defendant, when he returned in 2011, he was prevented from completing the drug court program because he no longer suffered from an addiction problem as determined by the drug court team. Because the drug court “kicked him out because he was no longer an addict means he did not receive the benefit of his bargain.” In opposition, the trial prosecutor argued defendant’s purported sobriety did not entitle him to dismissal of the felony charge against him. Defendant had entered into a negotiated plea agreement to defer entry of judgment so he could participate and successfully complete a drug court program. Although he had the opportunity to complete the drug court program in 2003 and 2004, defendant had “dropped out.” When defendant returned many years later, he was apparently no longer eligible for drug court because he may have achieved sobriety. However, the fact of his purported sobriety did not entitle him to dismissal of the charges as if he had successfully completed the drug court program. In reply, defense counsel argued it was unfair, inequitable, and unjust, to find defendant in violation of his plea agreement because his exclusion from the drug court program was based on the fact that he would not benefit from that program. The trial court found defendant’s arguments unpersuasive, and, without further comment, denied defendant’s motion to withdraw his plea.

On November 3, 2011, defendant appeared for sentencing. At that time, defense counsel asked the court for a continuance to file a motion for specific performance of the plea agreement, arguing that “in hindsight” the motion to withdraw the plea “was probably the wrong motion to bring.” In support of the continuance request, defense counsel again argued that although defendant was in “bench warrant status for a long time,” when he was

returned to court he was referred back to the drug court program and continued in the program “for four months, testing clean, doing everything the program requested of him to do,” and he was kicked out of the program because he was no longer a drug addict. According to defendant, his plea agreement was to allow him to participate in the drug court program, he did not quit the program, he was kicked out to make space for someone who needed their services, and he should not “suffer this conviction because he is sober.” The trial court ruled that defendant had failed to present “good grounds” to continue the matter.

After both counsel presented arguments on the issue of sentence, the court placed defendant on formal probation for a period of three years with associated conditions including 59 days in county jail. The court granted defendant credit for time served of 59 days. The People moved to immediately terminate probation and the associated conditions as defendant had had no contact with California law enforcement in the previous nine years. The court granted the People’s motion and ordered that defendant’s probation was successfully terminated.

Defendant filed a timely notice of appeal and his request for a certificate of probable cause was granted by the trial court.

## **DISCUSSION**

At the time of defendant’s guilty plea in 2003, the trial court agreed to defer entry of judgment on condition that defendant participate in and successfully complete the San Francisco drug court program. By his motion to withdraw his plea, defendant sought, in effect, to be relieved of the requirements of the DEJ program. He argued that his failure to complete a drug court program was not his fault and he had been improperly found to be not suitable when he was reassessed for drug court in 2011. However, as we now discuss, the trial court could reasonably find that during the eight years following his guilty plea defendant had an opportunity to complete the drug court program but had failed to do so without good cause and had failed to demonstrate he would benefit from drug education, treatment, or rehabilitation. (See *People v. Rios* (2011) 193 Cal.App.4th 584, 589 [as an

appellate court we uphold a trial court's implied factual findings when supported by substantial evidence].)

The DEJ program pursuant to section 1000 et seq. “serves the twofold purpose of rehabilitating an ‘ “experimental or tentative user . . . without the lasting stigma of a criminal conviction’ ” and ‘ “reduc[ing] the clogging of the criminal justice system by drug abuse prosecutions . . . .” ’ [Citations.] Under the statutory scheme, defendants charged with certain offenses involving controlled substances . . . may consent to DEJ and thereby be diverted from conventional criminal prosecution. [Citations.]” (*People v. Orozco* (2012) 209 Cal.App.4th 726, 731 (*Orozco*)). “[U]nder the requirements of the statute [§ 1000.1], the defendant is told at the outset, before entry into the program, that the charges will be dismissed after successful completion of the program, within a specified time period, but that ‘any failure’ under the program, without reference to a time period, will result in the entry of judgment on the charge or charges to which the defendant pled.” (*People v. Popular* (2006) 146 Cal.App.4th 479, 485 (*Popular*)). “The period during which deferred entry of judgment is granted shall be for no less than 18 months nor longer than three years.” (§ 1000.2.) “If the [trial] court finds that the defendant is not performing satisfactorily in the assigned program, or that the defendant is not benefiting from education, treatment, or rehabilitation, . . . the court shall render a finding of guilt to the charge or charges pled, enter judgment, and schedule a sentencing hearing as otherwise provided in this code. [¶] If the defendant has performed satisfactorily during the period in which deferred entry of judgment was granted, at the end of that period, the criminal charge or charges shall be dismissed.” (§ 1000.3.)

We reject defendant's argument that the trial court “did not retain the authority to terminate” his participation in the DEJ program based on his conduct before his return to court in 2011. The statutory scheme not only permits but requires assessment of a defendant's performance during the entire period during which entry of judgment has been deferred by the trial court. (See *Popular, supra*, 146 Cal.App.4th at p. 484 [“dismissal of a charge or charges against a defendant in a deferred entry of judgment program is triggered

by successful completion of a drug treatment program, as specified in the statute, and not . . . by the mere passage of three years”]; *People v. Cisneros* (2000) 84 Cal.App.4th 352, 356 [pertinent inquiry is whether the defendant performs “satisfactorily throughout the duration” of the DEJ program].)

The DEJ program provides for the establishment of drug courts: “The drug court program shall include a regimen of graduated sanctions and rewards, individual and group therapy, urine analysis testing commensurate with treatment needs, close court monitoring and supervision of progress, educational or vocational counseling as appropriate, and other requirements . . . .” (§ 1000.5, subd. (a).) By his actions defendant apparently understood that despite his move from San Francisco to Sacramento, he was still obligated to meet the requirements of the DEJ program including successful completion of a drug court program. Although defendant claimed he entered a court-approved drug program in Sacramento in 2004, he admits he did not complete that program. The trial court was free to reject his argument that his termination from that program was beyond his control because he could not pay for the associated costs. “[S]ection 1000, subdivision (c) accommodates the indigent defendant.” (*People v. Trask* (2010) 191 Cal.App.4th 387, 397.) It “expressly limits defendants referred for deferred entry of judgment to either ‘programs that have been certified by the county drug program administrator . . . or to programs that provide services at no cost to the participant and have been deemed by the court and the county drug program administrator to be credible and effective.’ That is, the defendant must be referred to an approved free drug diversion program or to a certified drug diversion program. Certified programs are required to include fee exemption provisions for persons who cannot pay. (§ 1211, subd. (a)(4).)” (*Trask, supra*, 191 Cal.App.4th at p. 397.) Here, there is no evidence that defendant ever “sought financial aid or an administrative review of his financial ability to pay.” (*Orozco, supra*, 209 Cal.App.4th at p. 735.) Instead, after termination from the Sacramento drug court program in 2004, defendant apparently made no further effort to comply with the requirements of the DEJ program until he was involuntarily



returned to court in 2011. Contrary to defendant's contention, we see nothing in the 2011 drug court reports indicating that after a six-week assessment (February through mid-March), the drug court assessors had determined defendant should be deemed to have successfully completed the drug court program because he had achieved sobriety and was not in need of drug education, treatment or rehabilitation. Instead, the drug court reports indicate only that defendant had given contradictory statements regarding his drug usage and he did not appear receptive to drug education, treatment, or rehabilitation.

We therefore conclude there is substantial evidence supporting the trial court's implied finding that defendant had not performed satisfactorily during the period of DEJ and he would not benefit from drug education, treatment, or rehabilitation. Consequently, the trial court did not err in deciding that the deferred judgment should be entered due to defendant's failure to comply with the requirements imposed by the court when it deferred entry of judgment.<sup>4</sup>

### **DISPOSITION**

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.

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<sup>4</sup> In light of our determination, we need not address defendant's other contention.